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In The

# Supreme Court of the United States

October Term, 1983

PEDRO DOAMAREL,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

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## QUESTIONS PRESENTED

I. Did the District Court abuse its discretion and commit prejudicial and harmful error in permitting testimony of petitioner's prior plea of guilty which was withdrawn, to be considered by the jury?

II. Did the District Court err in failing to suppress the testimony of government witness Ronald Simmons as being involuntary and coerced?

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No.

In The

# Supreme Court of the United States

October Term, 1983

PEDRO DOAMAREL,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner Pedro Doamarel respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding of February 7, 1984.

## OPINIONS BELOW

The opinions of the United States Court of Appeals for the Third Circuit and the United States District Court for the District of Delaware appear in the Appendix hereto.

## JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on February 7, 1984. A timely petition for rehearing en banc was denied on March 19, 1984, and this petition for certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

## STATUTORY PROVISIONS INVOLVED

Federal Rules of Evidence:

> Rule 404(b): OTHER CRIMES, WRONGS, OR ACTS. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

## STATEMENT OF THE CASE

Petitioner, Pedro Doamarel, was arrested pursuant to an indictment and a superseding indictment issued by a federal grand jury, charging the petitioner in a three count indictment with conspiracy to manufacture metamphetamine.

All pre-trial motions were disposed of in the present matter before the Honorable Murray M. Schwartz.

The Government presented an alleged co-conspirator, Ronald F. Simmons, to testify in exchange for a sentence of time served on another outstanding case by the State of Delaware and in exchange for federal charges on another outstanding case would

be favorably disposed of and that the Drug Enforcement Agency would intervene on all outstanding cases against him. The Government also produced Special Agent William R. Bouldin and Agent William Glance of the DEA who further testified that in executing a search warrant of the methamphetamine lab in question here, there was no evidence or other paraphernalia of a crime suggesting any involvement of the petitioner. In addition, DEA Agent Glance testified that there was no documentation of any purchase of any drug or drug paraphernalia in this entire case which is signed or evidenced by any indication that the petitioner was involved.

The petitioner, on the other hand, produced Tyrone Smith to testify in his behalf. Mr. Smith was a conspirator in this same crime that the petitioner was charged with. Mr. Smith entered a plea of guilty to similar charges, however, he did not make any deal to testify against anyone with respect to this matter. Mr. Smith testified that Mr. Doamarel had no involvement whatsoever with the commission of any crime alleged in this indictment. Mr. Smith simply testified that he paid the petitioner $400 for the use of a car which Mr. Smith used to make trips to Kentucky and New Jersey for the purchase of drug paraphernalia. However, the petitioner had no knowledge of this and was not a co-conspirator or involved in any regard with any crime which was committed or is referred to in the original or superseding indictment.

On or about February 16, 1983, petitioner Pedro Doamarel was found guilty of only Count III of the superseding indictment and was sentenced on August 3, 1983 to a period of incarceration for a term of five years.

The United States Court of Appeals for the Third Circuit had jurisdiction of the appeal in that it was a direct appeal from a judgment and sentence entered in accordance with 28 U.S.C.

§1291 by the United States District Court for the District of Delaware by the Honorable Murray M. Schwartz on August 3, 1983.

## REASONS FOR GRANTING THE WRIT

### I.

**The decision below raises significant problems and has departed from the accepted usual course of judicial proceedings concerning the admission into evidence of proof of prior crimes.**

The trial court abused its discretion and committed prejudicial and harmful error in permitting testimony of petitioner's prior plea of guilty which was withdrawn, to be considered by the jury.

On page 150 of the Notes of Testimony on February 14, 1983, defense witness, Tyrone Smith, testified concerning his guilty plea. In response to a question by the Assistant United States Attorney, Theopalis Gregory, the following colloquy occurred concerning Mr. Smith's change of plea agreement.

> Q. Well, let me show you page 21 of your change of plea, and I ask you to look at page, top of page 22 where it says, "Q.", and that's by the judge. Would you please read from there? A. "How did you, in fact, conspire to manufacture metamphetamine?" Yes was my answer.
>
> Q. Next question? "A. Who did you conspire with?"
>
> And what is your answer to that question? A. Pedro Doamarel.

> Q. Does the name Ron Simmons appear in the transcript? A. No, it don't.
>
> THE COURT: Now, the witness wants to say something.
>
> THE WITNESS: At the time when I said that the lawyer had advised me to say that because of both of us pleaded guilty. At that particular time, Doamarel testified the same way, he said he was conspiring with me. (NT149, 150).

The substance of this testimony concerns the petitioner's prior guilty plea, which subsequently he was permitted to withdraw. The witness, Tyrone Smith, is testifying concerning Doamarel's prior plea of guilty, which is not before the jury to consider. It is asserted that this testimony prejudiced the petitioner's right to a fair trial.

Numerous cases have held that in certain circumstances, evidence of unrelated criminal conduct is inadmissible to prove disposition to commit a crime from which the jury may infer that a defendant committed the crime charged. *Drew v. United States,* 331 F. 2d 85, 92 (3rd Cir. 1964); *United States v. Cook,* 538 F. 2d 1000 (3rd Cir. 1976). In the present case, it is therefore asserted that evidence of a prior plea of guilty, subsequently withdrawn, is even more prejudicial than evidence of unrelated prior criminal conduct.

The defendant is thus denied due process of law by the introduction of such evidence, since it impairs his right to *United States v. Myers,* 261 F. Supp. 151, 153 (E.D. Pa. 1966).

In recent decades, the common law rule against introduction of proof of other crimes has been eroded. However, it remains

the law. Thus, the court has said: "Evidence of other offenses may be received if relevant for any purpose other than to show a mere propensity of disposition on the part of the defendant to commit a crime." *United States v. Stirone,* 262 F. 2d 571, 576 (3rd Cir.), *reversed on other grounds,* 361 U.S. 212 (1960). A similar statement has recently been adopted in Rule 404(b) of the Federal Rules of Evidence. Specifically, Rule 404(b) permits introduction of other crimes or wrongs to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Obviously, the petitioner's case does not fit within one of these exceptions.

In the case of *United States v. Cook, supra,* where the defendant was convicted in the United States District Court for the District of Delaware, of armed robbery of a bank, the court considered this very issue. The Circuit Court of Appeals held that it was an abuse of discretion to permit the prosecutor to introduce evidence of defendant's prior sodomy conviction, where such evidence was relevant only to a collateral issue, and thus the court must consider the government's actual need for such evidence. The Circuit Court went on to say that where the nature of a prior offense has a high potential to inflame the jury, the government must make a showing of necessity and that where such wrongdoing on the part of the defendant is of a provocative nature, the trial court should take care to minimize the potential for prejudice by excluding such evidence.

In that case, the Circuit Court reversed the District Court of Delaware, since the evidence was of little probative value. In the present case, the prejudice to the petitioner is even more apparent. The court and the jury was already aware that Tyrone Smith had entered a plea of guilty to charges arising out of the same series of transactions that led to the indictment and arrest of the petitioner. Nevertheless, the Assistant U.S. Attorney elicited from the witness, the fact that not only had the witness pled guilty

to these charges, but so had the petitioner previously. Therefore, how could the jury not be prejudiced after it had heard that the petitioner in fact had previously entered a plea of guilty to the very same charges.

In addition, the government should have been aware of the potential for harm in pursuing its line of questioning which points out the potential for prejudice when the jury is informed of the nature of a prior felony, unrelated to the present one. In the present case, this jury not only was informed of the nature of the charges previously lodged against the petitioner, but that he had previously pleaded guilty to those charges.

In *United States v. Goodwin,* 492 F. 2d 1141, 1150 (5th Cir. 1974), cited in the *Cook* decision, the Circuit Court outlined some of the considerations relevant to balancing the introduction of wrongdoings on the part of the defendant:

> "We must balance the actual need for that evidence in view of the contested issues and the other evidence available to the prosecution, and the strength of the evidence in proving the issue, against the danger that the jury will be inflamed by the evidence to decide that because the accused was the perpetrator of the other crimes, he probably committed the crime for which he is on trial as well."

This prejudice becomes even more significant when the jury reached a verdict of not guilty on two counts of the superseding indictment, and guilty on the third count. Certainly, the jury took into consideration, and was prejudiced by, the testimony of Tyrone Smith concerning this third count.

It must be noted that the court, in trying to remedy the wrong which occurred, did not sufficiently protect the petitioner in this

case. On page 152 of the Notes of Testimony, the court sustains defense counsel's motion to strike. However, in so doing, it does not explain to the jury the circumstances surrounding Mr. Doamarel's previously entering a plea of guilty and subsequently withdrawing that plea. Therefore, unfortunate inferences can be drawn against the petitioner: inferences that lead one to believe that the petitioner was guilty of the crime charged, did not voluntarily withdraw his guilty plea, voluntarily withdrew his guilty plea in the present case in exchange for leniency on possible outstanding unrelated cases, changed his mind, obtained better counsel after entering his plea of guilty such that he now was more confident in his trial counsel, or other such inferences. Such inferences certainly prejudice the petitioner's right to a fair trial.

## II.

**The decision below raises significant problems and has departed from the accepted and usual course of judicial proceedings concerning the suppression of involuntary and coerced testimony of a government witness.**

The District Court erred in failing to suppress the testimony of government witness Ronald Simmons as being involuntary and coerced.

It has been held that threats are implied threats, which are used as a leverage in forcing a government witness to testify against an alleged perpetrator, may render his testimony as being involuntary and inadmissible. *United States v. Laughlin*, 222 F. Supp. (D.D.C. 1963), *United States v. Wite*, 401 U.S. 745 (1971); *Lopez v. United States*, 373 U.S. 427 (1963). In the present case, petitioner contends that the co-conspirator Ronald Simmons testified at trial on behalf of the government only because of threats and pressure from the government. Therefore, since his testimony is involuntary, it should not have been admissible.

Although many of the cases discussing this matter have concerned suppressing tape recordings because it was found that witnesses' consent was involuntary, *see United States v. Wite, supra, Lopez v. United States, supra,* and the suppression was based on the violation of the Fourth Amendment. It should be noted that this same reasoning should apply to the involuntary testimony of an informant.

In the case of *United States v. Osser,* 483 F. 2d 727 (3rd Cir. 1973), *cert. denied,* 94 S. Ct. 457 (1973), the court discusses the voluntariness of the government witnesses' consent to taping of telephone conversations. In finding that the informant testified voluntarily, it based its conclusion on his testimony at trial that he did not feel pressured by the government's request that he believed his promised immunity would be forthcoming whether or not he consented. In the present case, although the issue does not concern a tape recording, it is apparent that the informant Ronald Simmons testified because of a threat of conviction of other unrelated offenses.

In the case of *Hoffa v. United States,* 87 S. Ct. 408 (1966), the Court discusses the testimony of a government witness. In its discussion, it states that the government witness could testify to conversations concerning the defendant and the witness and these conversations did not violate the Fifth Amendment right against self-incrimination, where the conversation was wholly voluntary. In the present case, the admissions of witness Ronald Simmons against petitioner are not the result of a voluntary conversation between the petitioner and the witness. Rather, they were involuntary and coerced.

Therefore, the court erred in not suppressing Ronald Simmons' testimony.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

LEVI W. EVANS, III
*Attorney for Petitioner*

## APPENDIX 1 — PETITION FOR REHEARING IN BANC DATED MARCH 19, 1984

UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

NO. 83-1587

UNITED STATES OF AMERICA

VS

PEDRO DOAMAREL,

APPELLANT

ROBERT B. MOZENTER, ESQUIRE
Suite 600, 1411 Walnut Street
Philadelphia, PA 19102
(215) 568 4630

ATTORNEY FOR APPELLANT

TO THE HONORABLE JUDGES OF THE SAID COURT:

The Third Circuit Court, Three Judge Panel, was incorrect in stating that the government witness' testimony of a prior plea of guilty on the part of the Appellant, which was withdrawn, was harmless error.

The Court, in its Memorandum Opinion, agreed with Appellant that the witness' statement was non responsive. In that, it is clearly the law of this Circuit that such testimony, under the appropriate circumstances, creates prejudicial error. It is asserted that in the present case, where the jury entered a verdict

of not guilty to two counts of the indictment and guilty on the remaining count, that such testimony prejudiced its members. Certainly, had there been no mention of Appellant's prior guilty plea, the Appellant, in retrospect, could have expected a not guilty on all three counts.

In *United States vs Cook,* 538 F.2d 1000 (3rd Cir 1976), which was an appeal, like the present one, from a District Court decision in the State of Delaware, the Third Circuit Court of Appeals held that it was an abuse of discretion and prejudicial error occurred when the Court permitted the prosecution to introduce evidence of a prior conviction. In that case, this Court stated that testimony concerning guilt of another crime *has a high potential to inflame the jury.*

Here, prejudice is even more severe and harmful in that the Government's informant, Tyrone Smith, testified that the Appellant, who did not take the witness stand, had plead guilty to the present crime. Therefore, jury knew that the Appellant had previously entered a plea of guilty to this crime. Certainly, this prejudiced Appellant in being found guilty of one of three counts.

## STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment that the panel decision is contrary to the decisions of the United States Court of Appeals for the Third Circuit, specifically *United States vs Cook, supra, United States vs Stirone,* 262 F.2d 571 (3rd Cir 1960), and Federal Rule of Criminal Procedure 404(b).

*Appendix 1*

I feel that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court. In addition, this appeal involves a question of exceptional importance, to wit: whether testimony of a withdrawn plea of guilty of the crime charged commits prejudicial and harmful error and deprives Appellant of relevant Constitutional rights.

Respectfully submitted,

s/ ROBERT B. MOZENTER,
ESQUIRE
ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I, ROBERT B. MOZENTER, ESQUIRE, do hereby certify that a true and correct copy of the foregoing Petition for Rehearing In Banc, was mailed by regular mail on the 7th day of March, 1984 to: Theopolis Gregory, Esquire, 5110 Boggs Federal Building, 844 King Street, Wilmington, DE 19801.

s/ Robert B. Mozenter, Esquire

## APPENDIX 2 — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED FEBRUARY 7, 1984

No. 83-1587

UNITED STATES OF AMERICA

v.

DOAMAREL, PEDRO,

*Appellant*

Appeal From the United States District Court For the District of Delaware
(Cr. No. 82-00019-02)
District Judge: Honorable Murray M. Schwartz

Before HUNTER and WEIS, *Circuit Judges*, and DUMBAULD,* *District Judge*

JUDGMENT

This cause came to be submitted on the record from the United States District Court for the District of Delaware and was submitted under Third Circuit Rule 12(6) on January 24, 1984.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the District Court entered August 3, 1983, be, and the same is hereby, affirmed.

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* Honorable Edward Dumbauld, United States District Judge for the Western District of Pennsylvania, sitting by designation.

*Appendix 2*

ATTEST:

s/ Sally Mrvos
Clerk

February 7, 1984

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 83-1587

UNITED STATES OF AMERICA

v.

DOAMAREL, PEDRO,

*Appellant*

Appeal From the United States District Court For the District of Delaware
(Cr. No. 82-00019-02)
District Judge: Honorable Murray M. Schwartz

Submitted Under Third Circuit Rule 12(6)
January 24, 1984

Before HUNTER and WEIS, *Circuit Judges,* and DUMBAULD,*
*District Judge*

MEMORANDUM OPINION OF THE COURT

HUNTER, *Circuit Judge:*

*Appendix 2*

1. After a jury trial Pedro Doamarel was found guilty of conspiring with Tyrone Smith and Ronald Simmons to manufacture a schedule II, non-narcotic controlled substance in violation of 21 U.S.C. §846.

2. Doamarel's primary point on appeal is that there was prejudicial error when, during the cross-examination, unindicted co-conspirator Smith referred to a prior guilty plea by Doamarel after the court had said, "Now, the witness wants to say something."

3. We agree with the government that Smith's statement was non-responsive. There really was no question pending and the testimony came in simply because of the court's statement "Now, the witness wants to say something." We cannot tell what action, if any, the defense took at this point. We do know that a side bar conference was immediately held following which the court gave curative instructions emphasizing the fact that Doamarel was before this jury following a plea of not guilty. The court fully and effectively brought this fact home to the jury. No member, despite questioning, stated that they had any question as to their duty in this regard or as to their understanding of the not guilty plea.

4. We agree with the district court that this was harmless error in a case in which there was more than ample independent evidence of the guilt of Doamarel.

5. Mr. Doamarel's second point is that the verdict was not supported by sufficient evidence. We, of course, must sustain the verdict if there is substantial evidence, taking the view most favorable to the government. *Glasser v. United States,* 315 U.S. 60, 80 (1941). We find that there was sufficient evidence and reject this contention of the appellant.

*Appendix 2*

6. Next, Doamarel claims that the Simmons testimony was not voluntary and should have been suppressed. This objection is raised for the first time on appeal. Simmons was, in fact, testifying pursuant to a plea agreement with the State of Delaware and the jury had before it the facts surrounding this agreement and defense had a full opportunity to cross-examine. Though weight is involved, admissibility is not, and the district court was correct in not suppressing the Simmons testimony.

7. Lastly, Doamarel contends that the court should have granted his motion for transfer. This is a matter left to the discretion of the trial court. We find no abuse of discretion.

8. The judgment of conviction will be affirmed.

TO THE CLERK

Please file the foregoing memorandum opinion.

JAMES HUNTER, III
*Circuit Judge*

Certified as a true copy and issued in
lieu of a formal mandate on April 12, 1984.

Test: s/ M. Elizabeth Ferguson
Chief Deputy Clerk, U.S. Court of Appeals
for the Third Circuit

**APPENDIX 3 — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE DATED JUNE 30, 1983**

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

Criminal Action No. 82-19

UNITED STATES OF AMERICA,

Plaintiff,

v.

PEDRO DOAMAREL,

Defendant.

At Wilmington this 30th day of June, 1983, for the reasons stated in the Opinion issued this date,

IT IS ORDERED that the motions of defendant Pedro Doamarel for a judgment of acquittal and for a new trial are denied.

s/ Murray M. Schwartz
United States District Judge

*Appendix 3*

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

Criminal Action No. 82-19

UNITED STATES OF AMERICA,

Plaintiff,

v.

PEDRO DOAMAREL,

Defendant.

Hon. Joseph J. Farnan, Jr., United States Attorney, and Theopalis K. Gregory, Esq., Assistant United States Attorney, Wilmington, Delaware; attorneys for plaintiff.

Robert B. Mozenter, Esq., and Michael S. Durst, Esq., Mozenter, Goldberg & Durst, Philadelphia, Pennsylvania; attorneys for defendant.

SCHWARTZ, District Judge

Defendant, Pedro Doamarel, has timely moved for a judgment of acquittal pursuant to Fed. R. Crim. P. 29(c)[1] and

1. Rule 29(c) provides:

> (c) Motion After Discharge of Jury. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made

(Cont'd)

for a new trial pursuant to Fed. R. Crim. P. 33.[2] Defendant claims that the evidence adduced at trial was insufficient to support the jury's finding of guilt on the third count of the superceding indictment, conspiracy to manufacture phelyl-2-propanone ("P-2-P"). In addition, defendant asserts that he was denied a fair trial as a result of a witness's testimony alluding to the defendant's previously withdrawn plea of guilty to one of the three charges for which the defendant was on trial.

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(Cont'd)

or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If the verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.

2. Rule 33 provides:

Rule 33. New Trial

The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

*Appendix 3*

Procedural History

On May 19, 1982, the defendant and a co-defendant, Tyrone Smith, were indicted on three counts — conspiracy to manufacture methamphetamine (Count I); conspiracy to manufacture amphetamine (Count II); and conspiracy to manufacture P-2-P (Count III) — in violation of 21 U.S.C. §§841(a)(1) and 846.[3] (Doc. 1). On August 16, 1982, the defendant and Smith agreed to and did plead guilty to Count I — conspiracy to manufacture methamphetamine. (Docs. 22 & 23). Pursuant to the plea agreements, the remaining two conspiracy counts, Counts II and III, were to be dismissed at sentencing. On December 21, 1982, the defendant was allowed to withdraw his guilty plea as a result of an erroneous instruction given to him regarding sentencing at the time his plea was entered. (Doc. 39). The defendant was then reindicted on the same charges (Doc. 40) and pled not guilty to all three counts. Co-defendant Smith was sentenced and subsequently incarcerated. On February 16, 1982, following a five-day jury trial, the defendant was found guilty of conspiracy to manufacture P-2-P and not guilty of conspiracy to manufacture methamphetamine and amphetamine.

Motion for a Judgment of Acquittal — Rule 29(c)

In passing on a Rule 29(c) post-trial motion for a judgment of acquittal, a district court is required to view the evidence before the jury when it returned a verdict of guilty in a light most favorable to the government and determine whether there was relevant evidence from which the jury could reasonably find the defendant guilty beyond a reasonable doubt. *Government of the*

3. 21 U.S.C. §846 makes it illegal to conspire to manufacture a controlled substance, the manufacture of which is a violation of 21 U.S.C. §841(a)(1).

*Appendix 3*

*Virgin Islands v. Bradshaw*, 569 F.2d 777, 779 (3d Cir.), *cert. denied*, 436 U.S. 956 (1978); *see Burks v. United States*, 437 U.S. 1, 17 (1978); *United States v. Brandon*, 633 F.2d 773, 780 (9th Cir. 1980).

The defendant challenges the sufficiency of the evidence to support the jury's verdict of guilty as to Count III, conspiracy to manufacture P-2-P, on two grounds: the credibility of the government's principle witness, Ronald Simmons, and the lack of evidence linking the defendant to any conspiracy to manufacture P-2-P. The government answers that questions of credibility are solely for the jury to determine and that participation in a conspiracy can be established beyond a reasonable doubt by circumstantial as well as direct evidence.

a. Credibility of Ronald Simmons

The defendant contends that a reasonable jury could not have found the testimony of Simmons credible. The defendant supports this allegation on the grounds that the government obtained Simmons' cooperation by making various favorable agreements with him in exchange for his testimony. The defendant also challenges as incredible Simmons' testimony that he agreed to manufacture P-2-P in order to settle a debt with the defendant who Simmons claims threatened him if he would not cooperate by manufacturing P-2-P. (Doc. 74 at A12-15).

The defendant correctly states that Simmons was testifying pursuant to a plea agreement with the State of Delaware (Government's Exhibit ("GX") 98) where he agreed to plead guilty to one drug conspiracy charge, unrelated to the charges against the defendant, in exchange for the dismissal of the five other drug charges and his appearance as a witness in this case. (Doc. 74

at A4-5; Doc. 75 at B87-88; Doc. 76 at BB45). Evidence was also adduced at trial that Simmons' testimony in this case might be considered at sentencing on the one state charge. The State would recommend that Simmons be sentenced to the time already served prior to sentencing. (Doc. 74 at A5; Doc. 75 at 89-90). In addition, Simmons received a promise from the Drug Enforcement Administration (the "DEA") that they would try to assist him in some unspecified manner in dealing with drug charges pending in Maryland. (Doc. 74, A7-8; Doc. 75 at B88; Doc. 76 at BB 45-46). Finally, evidence was adduced at trial indicating that Simmons was promised that he would not be required to testify against his girlfriend and others who were under indictment in Delaware on drug charges. (Doc. 74 at A5; Doc. 77 at C24-27).

In *Burks v. United States*, 437 U.S. at 16, the Supreme Court stated that a "trial court, which has heard the testimony of witnesses first hand, is not to . . . assess the credibility of witnesses when it judges the merits of a motion for acquittal." *See United States v. Jannotti*, 673 F.2d 578, 598 (3d Cir.) (en banc), *cert. denied*, 457 U.S. 1106 (1982); *United States v. Bocra*, 623 F.2d 281, 289 (3d Cir.), *cert. denied*, 449 U.S. 875 (1980); *United States v. Bazzano*, 570 F.2d 1120, 1127 (3d Cir. 1977), *cert. denied sub nom., Matz v. United States*, 436 U.S. 917 (1978). This prohibition is especially true where the defendant has had an opportunity to cross-examine the witness and the jury has been properly instructed as to its role in assessing the credibility of witnesses. *See Hoffa v. United States*, 385 U.S. 293, 311-12 (1966); *United States v. Blasco*, 581 F.2d 681, 684-85 (7th Cir.), *cert. denied*, 439 U.S. 966 (1978); *United States v. Bazzano*, 570 F.2d at 1127.

In the present case, there is no reason for this Court to depart from clear precedent and assess the credibility of Simmons. Even though Simmons was testifying as an accomplice and pursuant

to a plea agreement and other inducements, his testimony was not incredible on its face and thus cannot be said to be incredible as a matter of law. *See Hoffa v. United States*, 385 U.S. at 311-12; *United States v. Cravero*, 530 F.2d 666, 671 (5th Cir. 1976), *cert. denied*, 423 U.S. 858 (1975).[4] In addition, the defendant thoroughly cross-examined the witness.[5] Finally, the jury was properly instructed as to its role in generally assessing the credibility of witnesses[6] and specifically in assessing the credibility of

---

4. In *United States v. Doamarel*, Cr. No. 82-19, memo. op. at 4 (D. Del. Jan. 26, 1982), this Court found that Simmons' plea agreement did not render his testimony inadmissible.

5. Doc. 75 at B87-114; Doc. 76 at BB1-42, BB47-51.

6. At trial, the jury was instructed as follows:

> You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves.
>
> You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness's intelligence, motive and state of mind, and demeanor and manner while on the stand. Consider the witness's ability to observe the matters as to which he has testified, and whether he impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.
>
> All evidence of a witness where self-interest is shown from either benefit received, detriments suffered, threats or promises made, or any attitude of the witness which might tend to prompt testimony either favorable or unfavorable to the

(Cont'd)

*Appendix 3*

Simmons.[7]

(Cont'd)

accused should be considered with caution and weighed with care. Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such credibility, if any, as you may think it deserves.

7. At trial, the jury was instructed as follows:

An accomplice is one who unites with another person in the commission of a crime, voluntarily and with common intent. Two witnesses, Ronald Simmons and Tyrone Smith, are alleged to be accomplices of the defendant in this case. An alleged accomplice does not become incompetent as a witness because of participation in the crime charged. On the contrary, the testimony of an alleged accomplice may be received in evidence and considered by the jury in deciding whether the defendant is not guilty or guilty.

As you have heard, Ronald Simmons, a government witness in this case, testified pursuant to the terms of an agreement he made with the Attorney General of the State of Delaware. In State Court, Mr. Simmons pled guilty to one count of conspiring to manufacture amphetamine. This conspiracy was not related in any way to the offenses with which the defendant, Mr. Doamarel, has been charged. Mr. Simmons also agreed to testify on behalf of the Government

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*Appendix 3*

Sufficiency of the Evidence

Having determined that the assessment of the credibility of Simmons should be left to the jury, the relevant question is

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in this case. As part of the agreement, the State of Delaware agreed to dismiss three felony counts and three misdemeanor counts relating to other drug offenses which were also not related or in any way connected to the offenses charged against Mr. Doamarel. The witness, Ronald Simmons, has also pled guilty in federal court to a crime arising out of the same occurrence for which the defendant is on trial.

Such plea bargaining, as it's called, has been approved as lawful and proper. A witness who testifies on behalf of the Government pursuant to a plea agreement with the Government in which certain charges against the witness were dismissed is competent to testify. His testimony may be received in evidence and considered by the jury whether or not it is corroborated or supported by other evidence presented in Court. However, Mr. Simmons' guilty pleas are not to be considered as evidence against the defendant.

His testimony, however, should be examined by you with greater care than the testimony of an ordinary witness. You should consider whether the testimony may be colored in such a way as to further the witness' own interest, for a witness who realizes that he can procure a benefit by incriminating another has a motive to falsify. If you determine that the testimony of Mr. Simmons was affected by the plea agreements, then you should keep in mind that such testimony is always to be received with caution and weighed with great care. After such consideration, you may give the testimony of Mr. Simmons such weight as you feel it deserves in deciding whether to find the defendant guilty or not guilty. However, you should never convict a defendant solely upon the unsupported testimony of such a witness unless you believe that testimony beyond a reasonable doubt.

(Cont'd)

whether, after viewing all of the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Commonwealth of Virginia*, 443 U.S. 307, 319 (1979). In the instant case, a review of all of the evidence in the light most favorable to the government amply supports the conclusion that any rational trier of fact could have found the essential elements of the crime of conspiracy to manufacture P-2-P beyond a reasonable doubt.

As the jury was instructed, the elements of the offense charged against the defendant — conspiracy to manufacture P-2-P are: (1) that the defendant agreed to intentionally and knowingly manufacture P-2-P; (2) that the conspiracy charged existed between May 1, 1981 and February 16, 1982; and (3) that the defendant willfully and knowingly became a member of the conspiracy. *See United States v. Bland*, 653 F.2d 989, 996 (5th Cir.), *cert. denied*, 454 U.S. 1055 (1981); *United States v. Dreyer*, 533 F.2d 112, 117 n.6 (3d Cir. 1976). The defendant does not contest the existence of a conspiracy to manufacture P-2-P between Simmons and Smith during the time set forth in the indictment.[8] The defendant challenges the sufficiency of the evidence linking the defendant to that conspiracy.

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(Cont'd)

> Again, I caution you, that Mr. Simmons pled guilty to certain offenses should not and cannot be considered as evidence against the defendant.

8. The evidence of a conspiracy between Simmons and Smith to manufacture P-2-P was overwhelming and noncontroverted. In addition to the direct testimony of Simmons (Doc. 74 at A8-46; Doc. 75 at B1-87) and Smith (Doc. 77, C95-162) in which they admit participation in the conspiracy, numerous purchase orders were admitted into evidence that reflect purchases by Simmons or Smith, under the alias "John Hall," of laboratory equipment and chemicals

(Cont'd)

*Appendix 3*

" 'Participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a development and collocation of circumstance.' " *United States v. Brandon*, 633 F.2d at 780 [quoting *Glasser v. United States*, 315 U.S. 60, 80 (1942)]. In addition to the testimony of Simmons directly linking the defendant to the conspiracy, the government introduced substantial direct and circumstantial evidence linking the defendant to the conspiracy.

Simmons testified as to the defendant's involvement in the conspiracy as follows. He met the defendant through Tyrone Smith in January, 1981 in Newark, Delaware. (Doc. 74 at A9). In April, 1981, Simmons became indebted to the defendant. The defendant suggested that Simmons could pay off the debt by manufacturing P-2-P for him. (Doc. 74 at A12-13). In May, 1981, Simmons met with the defendant, Smith and another male who told Simmons the formula for manufacturing P-2-P. (Doc. 74 at A14-18). Soon after the May meeting, Simmons began production of P-2-P. Arrangements were made for Smith and the defendant to pick up the P-2-P from Simmons. (Doc. 74 at A22). The defendant reimbursed Simmons for rental payments for the clandestine laboratory in Wilmington, Delaware and for lab equipment and chemicals. (Doc. 74 at A25-26, A39-40). In October, 1981, the

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to be used in the manufacture of P-2-P. (GXs 11-54, 56-65, 67-68). Smith admitted using the name "John Hall" (Doc. 77 at C109) when purchasing these items from the companies described by Simmons. *See infra* p. 11. Moreover, Smith was observed making purchases at these companies on numerous occasions. *See infra* pp. 9-10 & note 10. Finally, numerous employees of various chemical and laboratory equipment companies testified that they had dealt with Simmons, Smith or both. (Doc. 76 at BB83-88 (Fraser); BB88-91 (Thomas); BB91-95 (Cesta); Doc. 77 at C14-17 (McCutcheon)). None of these witnesses, however, remembered seeing the defendant at their stores or at any other time.

defendant directed Simmons to teach Smith how to manufacture P-2-P so that Smith and the defendant could produce it in Philadelphia, Pennsylvania. (Doc. 74 at A31-32). Simmons went to Philadelphia to assist Smith and the defendant in manufacturing P-2-P. (Doc. 74 at A32, A39). Simmons continued to supply P-2-P manufactured in Delaware to the defendant. (Doc. 74 at A34).

A note (GX 1) identified by Simmons and found at his residence in a search conducted on February 9 and 10, 1982 (Doc. 74 at A44) stated "Baz 276-8089." Simmons stated that the note referred to the telephone number of Pedro Doamarel. (Doc. 74 at A44). Another note (GX. 2), found in the same search and also identified by Simmons, stated "Pedro Doamarel 276-2562." (Doc. 74 at A45-46). These phone numbers were listed under the name of Venice Brown, the defendant's sister (Doc. 77 at C124), at 7538 Gilbert Street, Philadelphia. (Doc. 77 at C37; GXs 84, 85). Documents introduced at trial linked the defendant to this address. The defendant listed 7538 Gilbert Street as his address on a credit card application. (GXs 79-80). Smith also placed the defendant in the residence at 7538 Gilbert Street (Doc. 77 at C110, C124, C131-132) and stated that 276-2562 was the defendant's telephone number. (Doc. 77 at C154). In addition, telephone toll records corroborated Simmons testimony (Doc. 71 at A42-46; Doc. 75 at B5-10; GXs 1, 2) that he spoke with the defendant on the telephone at numbers listed at 7538 Gilbert Street on numerous occasions in connection with the conspiracy. The toll records indicate that between the dates set forth in the indictment 362 calls were made between phones linked to either Simmons or the defendant. (GXs 81-89, 93, 94; Doc. 77 at C31-38).

A third note (GX 6), found in the search of Simmons' residence detailed an exchange of cash, lab equipment and chemicals, the type which could have been used in the manufacture

of P-2-P,[9] between "Ron" and "Bazil," including the sale of "900 MLs of Product" for $900.00. (Doc. 75 at B11-14). Simmons testified that "product" referred to P-2-P. (Doc. 75 at B14). Both Ronald Simmons and Tyrone Smith testified that "Bazil" is a nickname used by the defendant. (Doc. 74 at A9-10; Doc. 77 at C125).

Simmons testified, moreover, that Smith often went to pick up lab equipment for Simmons to be used in manufacturing P-2-P at the Laboratory Glass, Co. and Ace Glass Co. in Vineland, New Jersey. (Doc. 74 at A23, A28, A36). Simmons testified that some of the chemicals for the manufacture of P-2-P were purchased from Raven Science, Inc. in Lexington, Kentucky. (Doc. 74 at A36). Evidence introduced at trial included the testimony of Special Agent Richard Compton of the DEA that he observed the defendant entering the Laboratory Glass Co. accompanied by Tyrone Smith. (Doc. 77 at C4-6). In addition, the defendant was observed on three occasions in 1981 — July 24th, September 19th and October 29th[10] — at Raven Sciences, Inc. with Tyrone Smith. (Doc. 76 at BB51-70). Trial testimony also disclosed that the defendant signed a car rental contract (GX 66) in his own name on July 24th in Louisville, Kentucky and that the car specified in the car rental contract was used by the defendant and Smith to pick up unidentified materials from Raven Science. (Doc. 76 at BB 53-55).

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9. *See* Doc. 77 at C79-92. (Testimony of Jack Fasanello, a forensic chemist describing equipment, chemicals, and procedures utilized in manufacture of P-2-P.)

10. The defendant was photographed on two of these occasions. (GXs 90(a-c) (Sept. 19, 1981); 91(a-c); 92(a-g) (Oct. 29, 1981)).

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Because the prosecution established beyond a reasonable doubt the existence of a conspiracy between Simmons and Smith to manufacture P-2-P, it had only to introduce evidence tending to show beyond a reasonable doubt that the defendant had at least a slight connection with the conspiracy. *See United States v. Brandon*, 633 F.2d at 780-81. The testimony of Simmons and the combination of circumstances and timing of events established by the evidence, and the reasonable inferences to be drawn from such evidence of the defendant's knowledge and willful participation in the conspiracy are sufficient to support the jury's verdict of guilt beyond a reasonable doubt. *See id.* at 781.

Motion for a New Trial — Rule 33

Defendant has also moved for a new trial pursuant to Fed. R. Crim. P. 33 on the ground that the unsolicited referral by Tyrone Smith, a defense witness, to the defendant's previously withdrawn plea of guilty to one of the charges for which he was on trial so prejudiced the jury that he was deprived of a fair trial.[11] The government states that the evidence was so overwhelming against the defendant that the witnesses nonresponsive statement, when considered in light of the entire trial, including the Court's instructions to the jury, constituted harmless error.

The facts underlying the motion for a new trial are as follows. The defendant called Tyrone Smith as its sole witness. Smith

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11. A trial court may, pursuant to Rule 33, order a new trial in the interests of justice when it does not believe the evidence supports the jury's verdict. *United States v. Dixon*, 658 F.2d 181, 193 (3d Cir. 1981). This differs from a finding under Rule 29 that the evidence when viewed most favorably to the government supports the jury's verdict irrespective of whether the Court actually agrees with that verdict or not. If the defendant is seeking such a ruling pursuant to Rule 33, the motion will be denied. The evidence amply supports the defendant's conviction.

testified that he had entered a plea of guilty (Doc. 77 at C96). At trial, Smith admitted to actually conspiring with Simmons to manufacture a controlled substance.[12] (Doc. 77 at C98-124). Smith testified that he had purchased laboratory equipment and chemicals for use in the manufacture of P-2-P as part of a scheme with Simmons. Smith stated that although the defendant accompanied him on some of these occasions, the defendant did not know of the purpose of the purchases or of the conspiracy to manufacture any controlled substance. (Doc. 77 at C98-124, 155-161).

On cross-examination, the government attempted to impeach Smith's testimony that Doamarel was not involved in the conspiracy with statements Smith made when he entered his guilty plea. The following exchange took place at trial:

> [By Mr. Gregory]
>
> Q. Well, you entered a Guilty Plea in this case; is that correct?
>
> [By Mr. Smith]
>
> A. Yes, I did.
>
> Q. And, what were you originally charged with?
>
> A. Original Indictment charged Conspiracy to Manufacture Methamphetamine. Conspiracy to

12. At trial no witnesses set forth clearly to which conspiracy count Smith pled guilty. The case record indicates that Smith pled guilty to conspiring to manufacture methamphetamine and that the charges of conspiring to manufacture P-2-P and amphetamine were dismissed when he was sentenced. (Doc. 22).

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Manufacture P2P. Conspiracy to Manufacture Methamphetamine.

* * *

Q. Let me show you what has been marked as Government's Exhibit No. 101. Looking at Page 14 where Tyrone appears and the next line down. Read that.

* * *

A. "Tyrone Smith has been duly sworn, was examined and testified as follows:".

Q. Now, I want you to look at the front of this particular document, Government Exhibit No. 101. Does this refresh your recollection as to the date when you entered your Guilty Plea?

A. August 16th.

* * *

Q. Turning to Page — Do you recall being asked who you conspired with with respect to the charges you entered a Guilty Plea to?

* * *

Q. Do you recall him asking that?

A. Do I recall him asking me that? I don't recall asking me who I conspired — Yes.

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Q. Do you recall that?

A. Yes.

Q. And, who did you say?

A. At the time he asked me the question, I really didn't know what to say. I think at the time my Lawyer advised me.

Q. Who did you say? Answer my question, please?

A. I think I said Ron Simmons and Pedro Doamarel.

Q. You think you said Ron Simmons and Pedro Doamarel?

A. Yes, I can't remember exactly.

Q. Well, let me show you Page 21 of your Change of Plea, and I ask you to look at Page — top of Page 22 where it says, "Question", and that's by the Judge. Would you please read from there?

A. "[Now] did you, in fact, conspire to manufacture Methamphetamine?" Yes was my answer.

Q. Next question?

A. "Who did you conspire with?"

Q. And, what is your answer to that question?

A. Pedro Doamarel.

Q. Does the name Ron Simmons appear in the transcript?

A. No, it don't.

THE COURT: Now, the Witness wants to say something.

THE WITNESS: At the time when I said that the Lawyer had advised me to say that because both of us pleaded Guilty. At that particular time, Doamarel testified the same way. He said he was conspiring with me.

(Whereupon a Sidebar conference was held out of the hearing of the Jury.)

* * *

(Jury back in box.)

THE COURT: Members of the Jury, I have granted a Defense Motion to strike the last portion of the testimony of this Witness in response to the last question which was asked of him.

I remind you, you should keep clearly in mind that Mr. Doamarel had pled Not Guilty of all the charges. He comes before you, at least at the start

of the Trial, with a clean slate. You have heard a lot of evidence. You will be the fact-finders as to whether he is guilty or not guilty, but he has pled Not Guilty to all charges and he is entitled, and you are instructed, that that is how you should consider this matter. He pled Not Guilty. He comes before you in the beginning of the trial with a clean slate and you go forward from there.

Does any Juror have any question as to your duty? If you do, I want you to raise your hand. If there is any question concerning the duty on the part of any Juror, this is your opportunity to raise your hand if you have one.

Let the record reflect no Juror has raised their hand.

(Doc. 77 at C146-153).[13]

Rule 52(a) of the Federal Rules of Criminal Procedure provides that any "error, defect, irregularity or variance which

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13. Defendant alleges that the Court was in error in allowing the jury to consider the defendant's withdrawn guilty plea. This allegation does not comport with the events at trial. As reflected in the trial transcript, Smith's nonresponsive answer was not admitted but stricken by the Court. Similarly, the defendant's argument that evidence of other crimes is inadmissible pursuant to Fed. R. Evid. 404(b) misses the mark. Evidence of a prior crime or of the defendant's withdrawn plea was not admitted at trial. The issue, as will be discussed, is whether Smith's non-responsive answer, even the ordered stricken, so prejudiced the defendant as to deprive him of a fair trial.

does not affect substantial rights shall be disregarded."[14] The harmless error doctrine applies to constitutional as well as non-constitutional errors. *Chapman v. California,* 386 U.S. 18, 22 (1967). In the instant case the parties have not stated whether the error at trial was constitutional or not. Since the error impinged upon the defendant's right to be presumed innocent until proven guilty, see *Bell v. Wolfish*, 441 U.S. 520, 533 (1979), and his constitutional privilege against self-incrimination,[15] the Court will assume, without deciding, that Smith's referral to the defendant's withdrawn guilty plea was an error of constitutional dimension. *United States v. Sikora*, 635 F.2d 1175, 1176 (6th Cir. 1980), *cert. denied*, 449 U.S. 993 (1980).

The standard for determining whether Smith's nonresponsive answer was harmless is whether it is clear beyond a reasonable doubt that absent his statements referring to the withdrawn guilty plea the jury would have returned a verdict of guilty.[16] *See United*

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14. In *United States v. Curizo,* 179 F.2d 380, 382 (3d Cir. 1950), the Third Circuit Court of Appeals held that a nonresponsive answer of a witness that was prejudicial to the defendant would not require a mistrial where the jury was instructed to disregard the testimony and the conviction was brought about by ample and persuasive evidence of the defendant's guilt. *See* Marsh v. United States, 82 F.2d 703, 704 (3d Cir. 1936). In reaching this conclusion, the Court utilized the same analysis used to assess whether evidence admitted as a result of a trial court error necessitated a new trial. 179 F.2d at 382. Applying the reasoning of *Curizo* to this case, the test for whether a new trial is required will be the same utilized when a court errs in admitting evidence at trial.

15. In addition, pursuant to Fed. R. Crim. P. 11(e)(6)(A), (C), any statements made by a defendant while entering a guilty plea cannot be used against the defendant at a later trial.

16. If the error was non-constitutional, then, unless there is a reasonable possibility that the error contributed to the conviction, reversal is not required.

(Cont'd)

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*States v. Hasting*, 51 U.S.L.W. 4572, 4575 (U.S. May 23, 1983) (No. 81-1463). In commenting on the harmless error doctrine, the Third Circuit Court of Appeals has stated that:

> a court must determine whether the constitutional error was harmless beyond a reasonable doubt and whether "there is a reasonable possibility that [the constitutional error] might have contributed to the conviction." Only when it can be said that no such possibility exists can a court conclude that the error was harmless. Of course, the closer the case, and the more important and persuasive the [prejudicial] evidence . . ., the less likely a court will find the error harmless. . . The clearer the case and the more overwhelming the untainted evidence, the more likely it is that a court will reach that conclusion. [citations omitted].

*United States v. Molt*, 615 F.2d 141, 145 (3d Cir. 1980) (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963), and citing *Chapman v. California*, 386 U.S. at 22, 24); *see United States v. Scarfo*, 685 F.2d 842, 845-46 (3d Cir. 1982), *cert. denied*, 103 S.Ct. 815 (1983). The mere fact that the untainted evidence was sufficient to sustain a defendant's conviction, however, does not necessitate a determination that the introducttion of prejudicial

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*Gov't of the Virgin Islands v. Bedford*, 671 F.2d 758, 762 (3d Cir. 1982). Stated another way, the issue to be determined is whether it is highly probable that the evidence of the defendant's guilty plea did not contribute to the jury's verdict. *Gov't of the Virgin Islands v. Toto*, 529 F.2d 278, 283-84 (3d Cir. 1976); *see United States v. Cook*, 538 F.2d 1000, 1005 (3d Cir. 1976). A comparison of the tests for non-constitutional and constitutional errors indicates that in this circuit the two standards are substantially similar. *See Gov't of the Virgin Islands v. Carino*, 631 F.2d 226, 230 (3d Cir. 1980).

evidence which infringes upon a defendant's constitutional rights constitutes harmless error. *See United States v. Molt*, 615 F.2d at 145. In assessing whether an error is harmless, all of the factors and circumstances of a particular case must be examined. *United States v. Hasting*, 51 U.S.L.W. at 4575; *United States v. Carney*, 461 F.2d 465, 468 (3d Cir. 1972).

As set forth in the discussion of the sufficiency of the evidence, *supra* at 8-10, the evidence of the defendant's guilt is overwhelming.[17] The defendant was linked by direct and circumstantial evidence to a conspiracy between Simmons and Smith to manufacture P-2-P. Simmons testified as to the defendant's direct involvement in the conspiracy. Although Simmons' credibility is questionable given the inducements offered to secure his testimony, many elements of his version of the defendant's involvement were corroborated by independent evidence — the notes found in Simmons' residence, the telephone toll records and the testimony of Smith. Direct evidence placed the defendant in the company of Tyrone Smith on numerous occasions while Smith was engaged in activities in furtherance of the conspiracy with Simmons to manufacture P-2-P. In addition, the defendant rented the car in Lexington, Kentucky, when he and Smith went to purchase chemicals at Raven Science, Inc.

The exculpatory evidence adduced at trial consisted of Smith's testimony regarding the defendant's ignorance of and lack of participation in any conspiracy and the lack of evidence that the defendant actually purchased lab equipment or chemicals. (Doc. 77 at C101). The telephone toll records corroborate Smith's testimony that he stayed often at this residence and received the

17. The inculpatory evidence will not be described in detail again.

phone calls from and made the calls to Simmons. (Doc. 77 at C110-11, C131-32). In addition, evidence was adduced at trial that the defendant was not identified by any witness as an actual purchaser of lab equipment or chemicals. *See supra* note 8. Moreover, evidence was adduced at trial that the defendant used his own name in all of his acts done in connection with the conspiracy. (GX 66). Finally, the defendant also had a job at this time (Doc. 77 at C102) and the defendant argued in summation that he had no motive to deal in drugs.

This exculpatory evidence does not significantly diminish the strength of the government's case. The credibility of Smith, an admitted friend of the defendant (Doc. 77 at C97), was subject to doubt. His statements that the defendant did not even know why Smith purchased chemicals and laboratory equipment, let alone that he was not a participant, were highly questionable. So was Smith's testimony that he and not the defendant made or received all of the calls to Simmons from the residence of the defendant's sister on Gilbert Street. The failure of any witness to identify the defendant as an actual purchaser of chemicals or equipment is consistent with Simmons' testimony that Smith and he, not the defendant, made the purchases. In addition, Smith possessed false identification under the alias of John Hall. The defendant's use of his real name when renting a car in Kentucky can be explained by the fact that the defendant possessed a credit card which greatly facilitated the renting of a car. Finally, employment is no guarantee that a person will not engage in criminal activity.

In addition to the strength of the evidence against the defendant, the jury's verdict indicates that they were able to disassociate the stricken testimony from their consideration of the defendant's guilt or non-guilt. Smith testified that he had pled

guilty but he did not specify to which counts of the three-count indictment he pled guilty. On cross-examination, the prosecutor did not ask him to which charge he pled. The only statement by the witness that was indicative of which count he pled to was his statement in which he admitted stating at the time he entered his guilty plea he conspired to manufacture methamphetamine. (Doc. 77 at C149, lines 24-25). Smith never explicitly stated to which count or counts he or the defendant pled guilty. He stated that at the time the defendant and he pled guilty, the defendant testified "the same way" as he did regarding who he had conspired with. (Doc. 77 at C150, lines 9-13).

From this exchange, the jury could have concluded that the defendant pled guilty to Count I, conspiring to manufacture methamphetamine or to all three counts. Perhaps more likely, the jury may have been uncertain as to which count or counts the defendant pled guilty. In any event, the jury's acquittal of the defendant on two of three counts supports the conclusion that they were not influenced by Smith's stricken testimony. If they believed the defendant pled guilty to conspiring to manufacture methamphetamine, they acquitted him on this count. If they believed he pled guilty to all three counts, or were uncertain as to which count or counts he pled guilty, they acquitted the defendant on those counts for which there was not sufficient evidence to support a finding of guilt beyond a reasonable doubt. It should be noted that the jury's verdict was fully consistent with the evidence adduced at trial. The government offered little evidence of the existence of conspiracies to manufacture methamphetamine or amphetamine let alone the defendant's involvement in these conspiracies.

While concerned about protecting the defendant's constitutional right to a fair trial, the Court is mindful of its duty

" 'to conserve judicial resources by enabling. . . courts to cleanse the judicial process of prejudicial error without being mired in harmless error.' " *United States v. Hasting*, 51 U.S.L.W. at 4575 [quoting R. Traynor, *The Riddle of Harmless Error* 81 (1970)]. Viewing Smith's statement in the context of the strength of the untainted evidence against the defendant, the instructions to the jury during and at the end of trial, and the jury's verdict of acquittal of two of three counts, the Court is convinced beyond a reasonable doubt that the jury would have returned a verdict of guilty absent the inadvertent introduction of evidence of the defendant's withdrawn guilty plea. Unlike *Chapman v. California*, 386 U.S. at 25-26, this is not a case where "absent the constitutionally forbidden comments, honest fair-minded jurors might very well have brought in not-guilty verdicts."

Finally, the defendant argues that the Court's curative instruction (Doc. 77 at C152-53) was inadequate. The defendant claims that the Court should have explained to the jury all of the circumstances surrounding the defendant's withdrawal of his guilty plea. The Court has considerable reservations that any defense attorney, especially one of considerable experience, would actually seek such an instruction. Moreover, at trial, the defendant's attorney stated: "I think it is safer to instruct the Jury that the Court has sustained a Motion to Strike that part of this testimony, the latter part of his testimony." (Doc. 77 at C151, lines 20-23; *see also* Doc. 83 at 4, lines 1-16). The Court instructed the jury as requested by the defendant. To instruct the jury as the defendant now states should have been done would have drawn undue attention to Smith's improper statements. More importantly, in the absence of plain error, the Court will not declare a mistrial on the ground of the impropriety of an instruction where that instruction was requested by the defendant at trial. *See id.*

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Conclusion

In summary, the defendant's motion for a judgment of acquittal and a new trial will be denied. An appropriate order will issue.

# APPENDIX 4 — DOCKET ENTRIES

## UNITED STATES COURT OF APPEALS
## FOR THE THIRD CIRCUIT

Case Closed 4/12/84 SS [CLOSED]

DOCKET NO. 83-1587

Related Cases _____ CALENDARED FOR: 1-31-84 MEDIA

Transferred from C.A. Misc. Record No. _____

| | | | |
|---|---|---|---|
| ORIGIN: | Delaware | DOCKETED: | 8-10-83 |
| DC DOCKET NO. | CR 82-00019-02 | ☒ Fee Paid | ☐ IFP ☐ CJA |
| DC JUDGE | Murray M. Schwartz | ☐ CPC Granted | |
| FILED IN DC | 5-19-82 | | |
| NOA FILED | 8-5-83 | DISCLOSURE Appt. | |
| CASE TYPE | CR - Manu. methamphetamine | STATEMENT Appee. | |

| TITLE OF CASE | APPEARANCES |
|---|---|
| UNITED STATES OF AMERICA<br><br>vs.<br><br>DOAMAREL, PEDRO,<br>Appellant | APPELLANT/PETITIONER:<br>Robert B. Mozenter - 8/12/83<br>Mozenter, Goldberg, Durst & Raiff<br>Suite 600, 1411 Walnut St.<br>Phila., Pa. 19102; 568-4630<br><br>APPELLEE/RESPONDENT:<br>Theopalis K. Gregory - 11-18-83<br>Assistant U.S. Attorney<br>U.S. Attorney's Office<br>5110 Boggs Federal Bldg.<br>844 King Street<br>Wilmington, DE 19801 - 302-573-6277<br>FTS 8-487-6277 |

☐ SEE REVERSE FOR CONTINUATION OF CAPTION/APPEARANCES.

*Appendix 4*

CLOSED

NO. 83-1587

| RECORD, EXHIBITS & BRIEF INFORMATION/Filing: | EXTENSION Flg. Motion for: | Ord Fld. | Ext. to: |
|---|---|---|---|
| 8/18/83 Partial Rec. or Cert. List | Record List | | |
| Record on Appeal ☐ IMPOUNDED | Transcripts | | |
| Covers # | | | |
| Transcript filed in DC: | | | |
| | Appl't's. Brief | | |
| 1st Supp. Record | | | |
| 2nd Supp. Record | | | |
| | Appee's. Brief | | |
| | Appee's. Brief | | |
| Exhibits ☐ EX. RM. ☐ SAFE | Appee's. Brief | | |
| Administrative Transcript | | | |
| 8/18/83 Briefing Notice Issued Covers # | | | |
| 9/13/83 Brief for Appl. MS 9/13/83 | | | |
| Brief for Appl./ Cross Appee. | | | |
| 10/5/83 Brief for Appee. MS 10/5/83 | Reply Brief | | |
| Brief for Appee. | | | |
| Brief for Appee. | Apee's | | |
| Brief for Appee./ Cross Appl. | 10-7-83 Supp. Appendix | 10-7-83 | 10-7-83* |
| Reply B. for Appl./ Cross Appee | | | |
| Reply B. for Appl. | | | |
| Supp. B. for Appl. | | | |
| Supp. B. for Appee. | | | |
| Brief for Amicus | | | |
| Intervenor | | | |
| 9/13/83 Appendix MS 9/13/83 | | | |
| 10-7-83 Record Appendix MS 10-7-83 (10cc) | | | |

* The granting of this mot. does not signify approval for both counsel's failure to confer and agree as to the contents of the appendix, the appellant: See Rule 30 (b) FRAP.

SUMMARY OF EVENTS

~~ARGUED~~/SUBMITTED 1/24/84

PANEL Hunter & Weis, C.J. & Dumbauld, D.J.

REARGUED

JUDGMENT-ORDER

OPINION(MEMO) 2/7/84 ☒ Signed ☐ P.C. N/P or Pub

MO. HUNTER CO DO

JUDGMENT Affirming.

PET. FOR REHG 3/7/84

☒ Denied ☐ Granted ☒ En Banc ☐ Panel

3/19/84

MANDATE STAYED TO 4/25/84

MANDATE ISSUED 4/12/84

RECORD RETURNED 4/12/84 C.L.

BILL OF COSTS

CERTIORARI FILED

☐ Denied ☐ Granted

S.C. #

Reported at F2d

CONTINUATION (CAPTION/APPEARANCES):

*Appendix 4*

## UNITED STATES COURT OF APPEALS
## FOR THE THIRD CIRCUIT

PAGE TWO CLOSED DOCKET NO. 83-1587

| DATE 1983 | FILINGS — PROCEEDINGS |
|---|---|
| Aug. 24 | Mot. by applt.'s cnsel to proceed on orig. record, w/serv., filed. |
| Aug. 29 | Order (Clerk) denying above mot. as presented. Cnsel may file xerox appendix in compliance with Rules 10 and 21 of Third Circuit Rules, file |
| 1984 | |
| Feb 27 | Motion by aplnt for leave to file pet for rehg out of time, w/serv, filed |
| Mar. 5 | Order (Hunter) Granting appellant leave to file petition for rehearing within 15 days from the date hereof, March 20, 1984, filed. |
| Mar. 26 | Application by aplnt for stay of Issuance of Mandate, w/serv, filed. |
| Apr. 3 | Order (Hunter, C.J.) granting stay of mandate until 4/25/84, filed. Court advises NO FURTHER EXTENSIONS. |
| Apr. 12 | Letter dated Apr. 9, 1984 from Robert B. Mozenter, Esq., counsel for appellant advising that he does not intend to go the the Supreme Court on behalf of Mr. Doamaral, filed. w/service |

END OF DOCKET